Editor's note: Appealed -- aff'd, Civ.No. A80-226 (D.Alaska Sept. 10, 1985), aff'd, No. 85-4221 (9th Cir. Sept. 28, 1987), 828 F.2d 1405

RICHARD L. NEVITT
(ON JUDICIAL REMAND)

IBLA 84-415 Decided December 21, 1984

Appeal from decision of the Alaska State Office, Bureau of Land Management, denying application for reduction in cultivation requirements for homestead entry F-19508.

Affirmed.

1. Alaska: Homesteads -- Homesteads (Ordinary): Cultivation

   An application for reduction in cultivation requirements pursuant to 43 CFR 2511.4-3(b)(1) will be subject to rejection if it appears at the date of initiation of the claim the conditions were such as to indicate to a prudent person that cultivation of the required acreage was not reasonably practicable.

2. Alaska: Homesteads -- Homesteads (Ordinary): Cultivation

   A decision rejecting an application for reduction of cultivation requirements will ordinarily be affirmed where it appears that the entry contains sufficient cultivatable acreage, but that the applicant has not succeeded in reducing the required acreage to cultivation.

APPEARANCES: Richard L. Nevitt, pro se; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Richard L. Nevitt appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated March 8, 1984, denying his application for reduction in cultivation requirements for homestead entry F-19508.

Appellant filed his homestead entry notice of location F-19508 on July 2, 1973, pursuant to 43 U.S.C. § 161 (1970), 1/ for 160 acres of

1/ The homestead laws were repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, § 702, 90 Stat. 2787, effective

unsurveyed land along the Stoney River in sec. 33, T. 17 N., R. 38 W., Seward Meridian. Final proof for the homestead claim was submitted June 29, 1978. On June 8, 1979, BLM issued a decision finding the final proof to be insufficient because on its face it showed that appellant had failed to meet the cultivation and residence requirements prescribed by statute and Departmental regulations. See 43 CFR 2567.5. BLM held the final proof for rejection and the homestead claim for cancellation pending submission of additional evidence. On May 13, 1980, the Board in Richard L. Nevitt, 47 IBLA 257 (1980), affirmed BLM's June 8, 1979, decision and held that appellant should be allowed "to amend homestead entry F-19508 to apply for a homesite claim of the 5 acres surrounding his improvements." 2/

Upon judicial review of this decision, an order was entered remanding the case to the Department for the purpose of adjudicating appellant's application for reduction in the cultivation requirements. Nevitt v. United States, Civ. No. A80-226 (D. Alaska, Order entered Dec. 17, 1982). This led to the decision of BLM rejecting appellant's application for reduction of the cultivation requirements which is the subject of the present appeal before the Board.

Appellant filed his application for reduction of cultivation requirements with BLM on November 17, 1982, under 43 CFR 2511.4-3(b). The application was supported by his Affidavit Concerning Application for Reduction of Cultivation Requirements. In this document appellant stated that the problem he encountered in clearing his land involved the removal of tree stumps of considerable size. Appellant explained that these stumps, which represented close to half of all stumps within the clearing, "have tough, massive laterals [roots] running down very deep into the soil sometimes in excess of 5 feet."

On August 9, 1983, a BLM realty specialist and a BLM soil scientist conducted a supplemental field examination of the claim with respect to the application for reduction. A report of that examination was completed on October 24, 1983. Based on this report BLM issued its decision of March 8, 1984, denying the application for reduction in cultivation requirements. The decision was based in part on the regulation at 43 CFR 2511.4-3(b)(1) which provides that a reduction in cultivation requirements will not be allowed "if it appears that at the date of the initiation of the claim the conditions were such as to indicate to a prudent person that cultivation of the required acreage was not reasonably practical." BLM also noted that appellant chose the method of blasting and winching to attempt clearing, rather than a more efficient means such as a bulldozer which would have permitted compliance with the cultivation requirements.

Oct. 21, 1976, except such repeal is effective on the 10th anniversary of FLPMA, Oct. 21, 1986, insofar as the homestead laws apply to public lands in Alaska.

2/ Appellant's homestead case was also reviewed by the Board previously in Richard L. Nevitt, 78 IBLA 300 (1984). In that appeal his claim to legislative approval of his homestead under section 1328(a) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2489, 16 U.S.C. § 3215(a) (1982), was rejected because of protests timely filed under section 1328(b) requiring adjudication of the homestead entry.

In his statement of reasons, appellant asserts that BLM based its decision on three erroneous findings: (1) that the specific conditions causing problems should have been recognized from the beginning, (2) that the bulldozer is the most efficient method of stump removal, and (3) that the timber size and density on nearby homesteads are similar to his.

Concerning appellant's first assertion, he states that timber density is readily apparent to the potential homesteader, but subsurface conditions are not. He notes that BLM's report failed to consider the abnormal stump depth or the almost tap root nature of these tree roots.

Regarding the second point appellant insists that, when dealing with large trees with deep roots, blasting is now and always has been the preferred method of removing deep-rooted stumps. Appellant explains that bulldozers leave subsurface root laterals which could break or impede plows. He says bulldozers merely break off the stumps with deep roots.

Regarding his third allegation, appellant contends that timber size and density on other nearby homesteads are not the same as on his entry. Further, appellant requests a hearing to present evidence to support his allegations.

In response, counsel for BLM reiterates that any stumpage problem should have been realized prior to entry. Further, it is asserted that failure to remove more stumps and cultivate the land was due to the methodology used by Nevitt and not due to the stumps themselves.

BLM makes reference to specific statements in both the case file and the field examination report to support its finding that Nevitt did not adequately familiarize himself with the land as required by 43 CFR 2511.1(a)(1). BLM notes that the method chosen by appellant, blasting and winching, did result in the removal of some stumps and questions why this method, if sufficient, did not result in the removal of more stumps.

On October 23, 1984, BLM filed a motion for expedited consideration of this case so that the litigation in the court case may proceed. BLM's motion is hereby granted.

The sole issue for determination is whether appellant qualifies for a reduction in the cultivation requirements.

[1] The Homestead Act, 43 U.S.C. § 164 (1970), provides that the Secretary of the Interior may, upon a satisfactory showing, under the rules and regulations prescribed by him, reduce the required area of cultivation. The pertinent regulation, 43 CFR 2511.4-3(b) states in part:

> (b) Reduction of requirements. (1) The requirements as to cultivation may be reduced if the land entered is so hilly or rough, the soil so alkaline, compact, sandy, or swampy, or the precipitation of moisture so light as not to make cultivation of the required amounts practicable, or if the land is generally valuable only for grazing. When action is taken on an application for a reduction of the required area of cultivation, consideration will be given all the attendant facts and circumstances,

> and if it appears that at the date of the initiation of the claim the conditions were such as to indicate to a prudent person that cultivation of the required acreage was not reasonably practicable or that there was a lack of good faith on the part of the claimant in making the entry, the application will be subject to rejection. * * *
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> (3) No reduction in area of cultivation will be permitted on account of expense in removing the standing timber from the land. If lands are so heavily timbered that the entryman cannot reasonably clear and cultivate the area prescribed by the statute, such entries will be considered speculative and not made in good faith for the purpose of obtaining a home. The foregoing applies to lands containing valuable or merchantable timber and will not preclude the reduction of area of cultivation on proper showing in cases where the presence of stumps, brush, lodge pole pine, or other valueless or nonmerchantable timber prevents the clearing and cultivation of the prescribed area.

The regulation at 43 CFR 2511.3-2(a) requires the entryman to be acquainted with the land. Also, 43 CFR 2511.1(a)(1) requires persons desiring to make homestead entries to "first fully inform themselves as to the character and quality of the lands." (Emphasis added.)

Appellant claims that BLM erred in its finding that the specific conditions causing problems should have been recognized from the beginning. Appellant disagrees, insisting that while density of timber is apparent to the potential homesteader, subsurface conditions are not. It is apparent from his affidavit, however, that appellant did not familiarize himself with the land and should have known the stump problem existed prior to entry. The affidavit reveals that appellant did not even acquaint himself with the land enough to know "where the clearing should go" until after he filed notice of location on July 2, 1973, and "was able to spend some time on the land" (Affidavit at 4). He did not cut down the trees on the 5 acres until September of 1974 and did not begin the blasting of the stumps until June 1975 (Affidavit at 5, 7). If the stumps were a hindrance to cultivation during the life of the entry as claimed by appellant, they were the same at the time of initiation of the entry and the problem should have been realized by appellant at that time in light of the heavily forested nature of the tract. The regulations provide that if the conditions were such as to indicate at the initiation of the entry that cultivation of the required acreage was not practicable, the application will be subject to rejection. 43 CFR 2511.4-3(b)(1); DeWitt W. Fields, 8 IBLA 160 (1972); Donald M. Fell, A-30862 (Feb. 21, 1968).

Appellant disagrees with BLM's statement that the timber size and density on nearby homesteads are similar to his. However, we note that BLM's conclusion that timber density and size on other sites are similar to appellant's is based on a finding in the field report. The report specified that the average tree density was 318 trees per acre, that the roots did appear to be deep, and that the timber on the homestead is typical of the area along Stoney River (Field Report at 2, 5).

[2] Appellant asserts that BLM erred in finding that the bulldozer was the most efficient method of stump removal. Appellant insists that, when dealing with large trees with deep roots, blasting is now and always has been the preferred method of removing deep-rooted stumps. Appellant has presented reasons to support his preference for blasting over bulldozing. In fact, appellant has demonstrated that stumps can be removed by blasting. However, appellant has failed to adequately explain why he could not remove enough stumps to enable him to cultivate the required amount of acreage. The realty specialist noted in the field report that another homesteader had removed his stumps from a similar site by using a bulldozer. In response, appellant stated in his affidavit that he deliberately chose not to purchase, ship, and use a bulldozer to clear because it "would not be worth it just to get it done in one week or so" (Affidavit at 6). This statement seems to indicate that he realized that a bulldozer could accomplish the task in a shorter period of time but chose not to purchase one because of the cost and inconvenience involved. Cost is not to be a factor in removing timber from the land. 43 CFR 2511.4-3(b)(3). Therefore, it would seem reasonable to assume that cost should not be a factor in removing stumps from the land. The Board has held that inability to meet financial demands of homesteading does not excuse noncompliance. Hicks Eugene Read, 15 IBLA 403 (1974).

Finally, the field report states that an adequate amount of acreage with good soils capability (at least 20 acres) in the vicinity of the clearing is available to satisfy the one-eighth cultivation requirement (Field Report at 2.) Appellant has not refuted this finding. Moreover, in his request for reduction of cultivation requirements appellant stated that a large portion of the claim contains potentially very good soil (Affidavit at 4). Therefore, since the soil is cultivatable and since appellant has not adequately shown that the presence of stumps prevents cultivation, as required by 43 CFR 2511.4-3(b)(3), BLM's decision denying appellant's application for reduction in cultivation requirements is properly affirmed. See Donald M. Fell, supra.

Appellant has requested a hearing. A hearing will not be granted unless appellant alleges probative facts which, if proven, would entitle him to the relief sought. See Kathleen M. Smyth, 8 IBLA 425 (1972). Appellant has failed to allege such facts. Accordingly, appellant's request for a hearing is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge